Law Enforcement Digest

October 2003

HONOR ROLL

561st Basic Law Enforcement Academy – April 10th through August 15, 2003

President:	Albert Schultz – Tacoma Police Department
Best Overall:	Patrick Patterson – Tacoma Police Department
Best Academic:	Patrick Patterson – Tacoma Police Department
Best Firearms:	Daniel Long – Tacoma Police Department
Tac Officer:	Officer Henry Gill – Tacoma Police Department

****

OCTOBER LED TABLE OF CONTENTS

****

BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

TRIBAL SOVEREIGNTY ISSUES RESOLVED IN COUNTY'S FAVOR IN CASE INVOLVING COUNTY'S EXECUTION OF SEARCH WARRANT AT TRIBAL CASINO ON RESERVATION – In Bishop Paiute Tribe v. Inyo County, California, 123 S.Ct. 1887 (2003), the U.S. Supreme Court holds that an Indian tribe is not a "person" who can sue in a civil rights action (under 42 USC Section 1983). The tribe sought to litigate sovereign tribal rights allegedly violated by a county's execution of an otherwise valid search warrant that county officials had obtained during investigation of possible welfare fraud by certain tribal employees. The U.S. Supreme Court holds, however, that section 1983 was designed to protect private (i.e., individual persons') rights against government encroachment, not to advance another sovereign's prerogative to withhold evidence relevant to a legitimate criminal investigation by a governmental entity.

The Bishop Paiute Tribe in California, an Indian gaming corporation, brought a federal court action challenging the authority of a county district attorney and sheriff. The county officials had previously executed a county court search warrant and had seized tribal casino employment records as part of a welfare fraud investigation of three casino employees. The tribe brought the federal court actions as the county officials were seeking a search warrant for additional records. A U.S. District Judge in California dismissed the action, but the Ninth Circuit of the U.S. Court of Appeals reversed. Now the U.S. Supreme Court has reversed the Ninth Circuit ruling as indicated above.

Result: Reversal of Ninth Circuit decision for Bishop Paiute Tribe; case remanded to lower courts to address whether the Tribe's as-yet largely unformed theory of the "common law of Indian affairs" somehow protects a tribe's right to be free from state court criminal processes.

****

BRIEF NOTE FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

CIVIL RIGHTS LIABILITY – SEVERAL HOUR DETENTION OF NON-SUSPECT AND UNJUSTIFIED INVESTIGATION INTO HER CITIZENSHIP VIOLATED FOURTH AMENDMENT – In Mena v. City of Simi Valley, 322 F.3d 1255 (9th Cir. 2003) in a case arising out of a raid by police looking for a drive-by shooter, the Court of Appeals holds, among other things: 1) that the manner of seizure and duration of detention of a non-suspect was objectively unreasonable and unnecessarily degrading and prolonged; and 2) officers unduly invaded the privacy of that legal resident-alien by unjustifiably inquiring into her citizenship status and searching her purse for immigration documents without her consent.

The Ninth Circuit describes the facts in Mena as follows:

> Just before 7:00 a.m. on February 3, 1998, several officers from the Simi Valley Police Department (SVPD) SWAT team executed a valid search warrant at 1363 Patricia Avenue. Brill and Muehler were directly responsible for supervising the search. The police officers searched the residence as part of their investigation of a gang-related drive-by shooting. The officers believed that Raymond Romero, the officers' primary suspect, was residing in the house, a single-family dwelling housing many unrelated residents. Iris Mena was a resident in the house, which was owned by her father, Jose Mena. The police officers forcibly entered the residence and observed that some of the rooms were locked, many with padlocks on the outsides of the doors. The officers proceeded to force entry into these locked rooms, including the bedroom in which Mena was sleeping. The officers, wearing SWAT team paraphernalia, found Mena in bed, and, pointing a submachine gun at her head, turned her over onto her stomach and handcuffed her. After searching her person and her room, the officers led Mena--barefoot and still wearing her pajamas--outside through the rain to a cold garage. Although she was absolutely compliant, the officers detained Mena in handcuffs for approximately two to three hours. While the police officers held Mena in the garage, the officers did not explain to her the reason she was being detained. During her detention, an immigration officer who had joined the police on the search asked Mena questions concerning her citizenship status. Upon learning from Mena that her citizenship documentation was in her purse, a police officer searched her purse without her consent. The police officers did not release Mena from the handcuffs until after they completed the search of the premises, at which time they finally informed her why she had been detained.

In regard to the first holding (unreasonableness of the seizure and detention), the Court of Appeals explains:

> In this case, the officers were investigating a gang-related drive-by shooting--clearly a serious crime. They were authorized under a warrant to search the Mena home and seize property in relation to their investigation of Raymond Romero, the officers' primary suspect. Mena, however, was not the subject of this investigation. Moreover, it was clear that Mena posed no "immediate threat to the safety of the officers or others." Nor did she actively resist arrest or attempt to flee. Mena had been asleep in her pajamas when the police entered her room. She was unarmed, docile, and cooperative in every respect.
>
> Yet, although searches of Mena's person and room produced no evidence of gang membership or contraband and eighteen well-armed SWAT team officers secured the house in a matter of minutes, the officers handcuffed Mena and kept

> her in handcuffs for two to three hours. By any standard of reasonableness, in light of the fact that Mena was not a suspect in the crime, the officers should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest--much less resist arrest "actively." Moreover, because Mena was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals--such as physical roughness, threatening deadly force, and using handcuffs for an extended period. Although we recognize that police officers are expected "to make split-second judgments" in "difficult and tense" situations, it strains reason to justify the necessity--in these factual circumstances--of pointing a machine gun at Mena's face, roughly jerking her off of her bed, marching her barefoot through the rain into a cold garage, and keeping her in handcuffs for several hours. We thus have no trouble in concluding that her detention was objectively unreasonable and "unnecessarily ... degrading [and] prolonged." Thus, Mena has asserted a violation of a constitutional right.

On the second holding (unreasonableness of the citizenship inquiry and the search for citizenship documents), the Court holds:

> In this case, both the police officer and the INS agent questioned Mena about her immigration status, presumably based on nothing more than her name or ethnic appearance. The officers simply did not have the particularized reasonable suspicion the Fourth Amendment requires to justify (1) questioning Mena regarding her citizenship status or (2) searching her purse for immigration documentation without her consent. Therefore, just on these facts alone, we note that Mena alleges a Fourth Amendment violation. In light of the circumstances surrounding her detention generally, the officers' questions and the search of her purse certainly constituted an "undue invasion of privacy."

In a footnote, the Court questions whether the local police officers had any authority to either assist the INS agent in the citizenship inquiry or to independently investigate on INS law.

Result: Affirmance of U.S. District Court jury verdict against Simi Valley police officers.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) "INDECENT EXPOSURE" IS A "CRIME AGAINST A PERSON" UNDER BURGLARY STATUTE -- In State v. Snedden, __Wn.2d __, 73 P.3d 995 (2003), the Washington Supreme Court rules, 8-1 (Justice Sanders dissenting), that the crime of "indecent exposure" is a "crime against a person" within the meaning of RCW 9A.52.030(1). Accordingly, when a man who previously had been ordered to stay out of a private college's library (because he had indecently exposed himself to a patron) subsequently returned to the library and again indecently exposed himself to others, he could be prosecuted for burglary in the second degree.

RCW 9A.52.030(1) (with underlining added) provides as follows:

> A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

The Supreme Court majority opinion summarizes its ruling in part as follows:

> To serve as the predicate crime for second degree burglary, the perpetrator must act "with [the] intent to commit a crime against a person...." RCW 9A.52.030. Steven J. Snedden made three indecent exposures and one attempted indecent exposure on the premises of Gonzaga University's Foley Center Library (hereinafter Foley Library). Two of the three exposures and the attempted exposure were done while trespassing. Because unlawful entry is a requirement of second degree burglary, only the exposures coupled with trespass are at issue. Mr. Snedden targeted female students studying alone in remote areas of the Foley Library. He exposed himself to the students, masturbated in their presence, and maintained eye contact with his victims throughout the encounters. We hold that the crime of indecent exposure is a valid predicate crime for second degree burglary because it requires knowledge that the obscene conduct is likely to cause a reasonable affront or alarm and only a person could be affronted or alarmed by this obscene conduct.

Result: Affirmance of Court of Appeals decision (see **August 2002 LED** at page 23) that reversed a Spokane County Superior Court order dismissing burglary charges against Steven J. Snedden; remanded for trial on two counts of burglary in the second degree and one count of attempted burglary in the second degree.

(2) WHERE DEFENDANT DOES NOT RAISE AS A QUESTION AT TRIAL HIS IDENTITY AS THE "PERPETRATOR", EVIDENCE OF DEFENDANT'S PRIOR SEX CRIME MAY BE ADMITTED AS REFLECTING A "COMMON SCHEME OR PLAN" IN SOME CIRCUMSTANCES WHERE THE PRIOR SEX CRIME DOES NOT HAVE A UNIQUE OR SIGNATURE "MO" – In State v. DeVincentis, __ Wn.2d __, 74 P.3d 119 (2003), the Washington Supreme Court affirms a decision of Division One of the Court of Appeals (112 Wn. App. 152 (Div. I, 2002)). The Supreme Court agrees with the Court of Appeals that evidence of a child rape defendant's sex crime over a decade earlier involving the defendant's grooming of a previous child victim over an extended period and defendant's telling of his prior victim not to tell was similar enough to his method of committing the presently charged crimes to make evidence relating to the prior crime admissible under the "common scheme or plan" provision of Evidence Rule 404(b).

Evidence of a person's prior bad acts or prior crimes is generally deemed irrelevant, and therefore inadmissible. That is because such evidence is highly prejudicial to the defendant, and such evidence does not necessarily prove that defendant committed the presently charged crime. The DeVincentis Court explains that there are two lines of cases where evidence of similar prior crimes have been admitted for limited purposes (and with limiting jury instruction). One line of cases involves the situation where there is doubt about the identity of the perpetrator in the presently charged crime. The DeVincentis Court explains that the case law governing admissibility of prior-crimes evidence in this circumstance is very strict. The modus operandi must be shown to be quite uncommon, i.e., tantamount to a signature crime.

But in cases such as DeVincentis, where there is no question as to the identity of the alleged perpetrator, and the defendant is arguing only that the victim fabricated the story or misunderstood the circumstances of the defendant's conduct, the test for admissibility of prior-crimes evidence is not so strict, the Court says. The leading case in this latter category is State v. Lough, 125 Wn.2d 847 (1995) **June 95 LED:06**, a case involving a rapist who drugged his adult victims. Lough held that, if the trial judge finds that similarities between the prior crime and the presently charged crime reasonably establish a common plan was carried out in each case, that is sufficient – an MO "signature" need not be proven in a case where identity is not at issue. In the Lough-type situation, the prior-crime evidence will be admitted without need to establish

"signature" (though with cautionary jury instruction) to show that the victim did not fabricate the story or misunderstand the circumstances. In the Court of Appeals decision in DeVincentis, the Court explained how this rule helps protect child sex victims:

> One reason the common scheme or plan exception arises in prosecutions alleging sexual abuse of children is that such crimes often occur only after the perpetrator has successfully used techniques designed to obtain the child's cooperation. Such techniques, including the desensitization of the child to nudity, and inducing the child's silence, are seen quite frequently in sex abuse cases precisely because they are effective in achieving the goal. Such techniques, to be part of an effective plan, do not have to be unique or uncommon. The child-victim, a vulnerable witness, is often the only source of evidence to prove the crime. The fact that it is a common occurrence for perpetrators to intimidate, bribe, or coerce their victims into keeping silent should not prevent a trial court from considering such a technique when repeated, as evidence of a plan to molest children. Just as drugging the rape victims inhibited reporting, and allowed the defendant in Lough to repeat his crime without getting caught, procuring the silence of children is a feature that makes it possible for a plan of molestation to be carried out successfully time after time.
>
> We decline the invitation to hold that the individual features establishing a common plan must be "unique or uncommon" as compared to the way the crime is typically committed. The inquiries and procedures set forth in Lough, if used conscientiously by the trial courts as was done in this case, are sufficient to guide the sound exercise of their discretion.

Result: Affirmance of Court of Appeals decision affirming the King County Superior Court conviction of Louis A. DeVincentis for child rape and child molestation.

****

WASHINGTON STATE COURT OF APPEALS

SEARCH UNDER WARRANT OF METH DEALER'S RESIDENCE UPHELD: 1) THEIN'S RESIDENCE-NEXUS PROBABLE CAUSE TEST MET; 2) WARRANT WAS OVERBROAD BUT SEVERABLE; 3) OFFICERS' DELAY IN SERVING WARRANT UNTIL 10TH DAY AFTER ISSUANCE DID NOT RESULT IN DISSIPATION OF PROBABLE CAUSE

State v. Maddox, 116 Wn. App. 796 (Div. II, 2003)

Facts and Proceedings below (Excerpted from Court of Appeals opinion):

> Christopher Dorian Maddox was convicted of two counts of possessing a controlled substance with intent to deliver. He contends on appeal that the police unlawfully searched his home. We affirm.
>
> On or before September 15, 2000, an informant told the police that he had purchased methamphetamine from Maddox at least 35 times in the past four years, typically in "quantities up to four ounces[.]" The record does not show whether those purchases occurred at Maddox's home.
>
> On September 15, the informant arranged a controlled buy at Maddox's house. The informant was searched by officers, furnished with cash, and watched until he entered the house. He emerged a few minutes later with methamphetamine. He related that he had bought the methamphetamine from Maddox and that Maddox had said he might be able to buy more if he "would bring back 'cash.' "

On September 18, 2000, [a detective] applied for a warrant to search Maddox's house. [The detective] described the September 15 controlled buy and related that the informant had successfully made two other controlled buys. [The detective] stated that public or law enforcement records showed that Maddox owned the house in question, that Maddox was the registered owner of a car parked in the driveway of the house, and that Maddox had a 1998 felony drug conviction. [The detective] related that the informant could identify methamphetamine, that the informant was "working with law enforcement in exchange for a favorable recommendation on pending felony drug charges[,]" and that the informant was wanted on a DUI warrant that was being held in abeyance at police request.

On September 18, 2000, at 4:06 p.m., the search warrant was issued by a magistrate. It authorized a search of the house for methamphetamine; paraphernalia used for packaging, weighing, and distributing methamphetamine; and currency, books, and records. *[Court's Footnote: The warrant authorized a search of Maddox's house for the following items: (1) METHAMPHETAMINE, a substance controlled by the Uniform Controlled Substances Act of the State of Washington, and items used to facilitate the distribution and packaging of METHAMPHETAMINE; (2) Records relating to the transportation, ordering, manufacturing, possession, sale, transfer and/or importation of controlled substances in particular, METHAMPHETAMINE, including but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, and the like; (3) Records showing the identity of co-conspirators in this distribution operation, including but not limited to address and/or phone books, telephone bills, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, and the like; (4) Records which will indicate profits and/or proceeds of the illegal distribution operation of METHAMPHETAMINE, to include, but not limited to books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, receipts, and the like;* ***(5) Books, records, invoices, receipts, records of real estate transactions, purchase, lease or rental agreements, utility and telephone bills, records reflecting ownership of motor vehicles, keys to vehicles, bank statements and related records, pay stubs, tax statements, cashiers checks, bank checks, safe deposit box keys, and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of money and/or dominion and control over assets and proceeds; (6) Photographs, including still photos, negatives, video tapes, films, undeveloped film and the contents therein, and slides, in particular, photographs of co-conspirators, of assets, and controlled substances, in particular METHAMPHETAMINE;*** *(7) Currency, and financial instruments, including stocks and bonds for the purpose of tracking proceeds and/or profits;* ***(8) Address and/or telephone books, telephone bills, and papers reflecting names, addresses, telephone numbers, pager numbers, of sources of supply, customers, financial institution, and other individuals or businesses with whom a financial relationship exists; (9) Correspondence, papers, records, and any other items showing employment or lack of employment of defendant(s) or reflecting income or expenses, including but not limited to items listed in paragraph 5, financial statements, credit card records, receipts, and income tax returns;*** *(10) Paraphernalia for packaging, weighing and distributing METHAMPHETAMINE, including but not limited to scales, baggies, and other items used in the distribution operation, including firearms;*

(11) Photographs of the crime scene and to develop any photographs taken of the crime scene, including still photos and videocassette recordings and to develop any undeveloped film located at the residence.]

The police did not serve the search warrant immediately. Instead, they had the informant conduct two more controlled buys at Maddox's house.

The first post-warrant buy took place on September 21, 2000. The informant was again searched by officers to insure he did not have drugs on his person. He was given $600, told to buy half an ounce of methamphetamine, and watched until he entered Maddox's house. He emerged a few minutes later with a full ounce of methamphetamine. He explained that Maddox had prepackaged his methamphetamine in full-ounce packets and would not sell part of a packet. Maddox had "fronted" the additional half-ounce for which the informant had not had money, so the informant now owed Maddox a "debt."

The second post-warrant buy occurred on September 27, 2000. Once again, the informant was searched to insure he did not have drugs on his person. He was instructed "to buy more [m]ethamphetamine if he could[,]" and also "to pay the 'debt' from . . . . September 21, 2000." He was furnished with $1,000 in identifiable bills and watched until he entered Maddox's house. He emerged a few minutes later without methamphetamine and with only $280 in cash. He said that he had used $720 to pay "debts" he owed to Maddox, and that Maddox had claimed to be "out of [m]ethamphetamine" for "a couple days."

On September 28, 2000, at 2:45 p.m., the police served the warrant they had been holding since September 18. They found and seized 881.6 grams of marijuana and 45 ecstasy pills, but no methamphetamine. They found and seized an electronic scale, $2,100 in cash (including the $720 furnished to the informant on September 27), and "misc[ellaneous] papers." The "papers" were not offered in the trial court and are not included (or even described) in the record on appeal.
On November 16, 2000, the State charged Maddox with [among other things] possession with intent to deliver marijuana (Count III), and possession with intent to deliver ecstasy (Count IV).

. . . [Maddox] moved to suppress the marijuana underlying Count III and the ecstasy underlying Count IV. He also waived a jury on Counts III and IV. In June 2001, the trial court denied his motion to suppress, convened a bench trial on stipulated facts, and convicted him on Counts III and IV.

[Bolding added to footnote]

ISSUE AND RULING: 1) Was there sufficient probable cause linkage to the residence of Maddox in the search warrant affidavit? (ANSWER: Yes, the restrictive residence-linkage standard of the Thein case was met on the facts of this case); 2) Was the warrant's search authorization overbroad (because of authorization for the officers to search for some items for which PC was not shown in the supporting affidavit), and, if so, was the unsupported part of the warrant authorization severable, such that the remainder of the warrant was enforceable? (ANSWER: Yes, the warrant was overbroad but severance saves the warrant); 3) Did the PC for search evaporate during the 10-day delay between warrant-issuance by judge and warrant-service by the officers? (ANSWER: No)

Result: Affirmance of Clark County Superior Court convictions for Dorian Maddox on two counts of possessing a controlled substance with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Thein, residence-nexus

> Relying on State v. Thein, 138 Wn.2d 1133 (1999) **Aug 00 LED:15** Maddox claims that Parsons' affidavit "does not establish probable cause to believe that any evidence of methamphetamine dealing would be found inside [his] residence." We disagree. [The detective's] affidavit showed (1) that the informant had bought methamphetamine from Maddox many times over the past four years, and (2) that on September 15, just three days earlier, the informant had bought methamphetamine from Maddox at Maddox's house. If the magistrate chose to believe those facts, as he obviously did, he could reasonably infer that Maddox was currently dealing methamphetamine out of his home; and if the magistrate could infer that much, he could also infer that Maddox had evidence of such dealing in his home.
>
> Maddox's reliance on Thein is misplaced. The question in Thein was whether a magistrate could reasonably infer, from the fact that a person was dealing drugs from a location *other than* his or her home, the additional fact that the person probably had drugs or evidence of drug dealing in his or her home. The question here is whether a magistrate can reasonably infer, from the fact that a person is dealing drugs *from* his or her home, the additional fact that the person probably has drugs or evidence of drug dealing *in* his or her home. The answer to the first question is no, but the answer to the second question is yes. When the magistrate issued the warrant on September 18, there was probable cause to believe Maddox had evidence of methamphetamine dealing in his home.

2) Overbroad but severable warrant **[See the LED Editorial Comment on this issue below]**

> A warrant can be "overbroad" either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist. Regardless of which reason is claimed, the warrant must be read "in a commonsense, practical manner, rather than in a hypertechnical sense [,]" "keeping in mind the circumstances of the case[.]"
>
> The warrant in this case authorized the police to search for a number of items that were supported by probable cause and described with particularity. Such items included methamphetamine; paraphernalia used for weighing, packaging, and distributing methamphetamine (including scales and baggies); and records indicating methamphetamine distribution and its profits (including books, notebooks, ledgers, check book ledgers, handwritten notes, journals, calendars, and receipts related to methamphetamine distribution). At the same time, however, the warrant authorized the police to search for many items for which there was no probable cause whatever: books and records showing "the identity of co- conspirators"; photographs of co-conspirators, assets, and drugs; and other books and records not associated with methamphetamine distribution. *[Court's Footnote: See supra n. 4, paragraphs (5), (6), (8) and (9) of the warrant. These paragraphs were not limited to items associated with methamphetamine. Accordingly, we hold that the warrant was overbroad.]*

Under the severability doctrine, " 'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant." Thus, the doctrine applies when a warrant includes not only items that are supported by probable cause and described with particularity, but also items that are not supported by probable cause or not described with particularity, so long as a "meaningful separation" can be made on "some logical and reasonable basis[.]" As the Washington Supreme Court has noted, "[i]t would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well."

Reasoning from these generalities, we think that the severability doctrine applies only when at least five requirements are met. First, the warrant must lawfully have authorized entry into the premises. The problem must lie in "the permissible intensity and duration of the search [,]" and not in the "intrusion per se."

Second, the warrant must include one or more particularly described items for which there is probable cause. Otherwise, there is nothing for the severability doctrine to save.

Third, the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole. If most of the warrant purports to authorize a search for items not supported by probable cause or not described with particularity, the warrant is likely to be "general" in the sense of authorizing "a general, exploratory rummaging in a person's belongings[,]" and no part of it will be saved by severance or redaction.

Fourth, the searching officers must have found and seized the disputed items while executing the valid part of the warrant (i.e., while searching for items supported by probable cause and described with particularity). Just as evidence found while executing a wholly invalid warrant would not be saved, and just as evidence found while exceeding the scope of a wholly valid warrant would not be saved, evidence found while executing the unlawful part of a partially valid warrant should not be saved either. . .

Fifth, the officers must not have conducted a general search, i.e., a search in which they "flagrantly disregarded" the warrant's scope. Just as such a search taints all parts of a warrant that was completely valid at the time of its issuance, it taints, a fortiori, all parts of a warrant that was only partially valid at the time of its issuance.

In State v. Perrone, (1992) **Nov 92 LED:04** on which Maddox heavily relies, the warrant met few of these five requirements. It purported to authorize a search for adult pornography that was not supported by probable cause, and for child pornography that was not described with particularity. Its lawful part was small when compared to its whole. Its lawful and unlawful parts were so inextricably intertwined that there was no way to tell which part the police were executing at the time they found and seized any given item. The police seem to have conducted a general search, for they seized many items not related to any crime.

In the present case, by way of contrast, the warrant meets all five requirements. It was valid to the extent it authorized a search for drugs, evidence of drug dealing, and books and records related to drug dealing. Although it was invalid to the extent it included books and records not related to crime, the defect went to "the permissible intensity and duration of the search" as opposed to the "intrusion per se[.]" Its grant of authority to search for methamphetamine, paraphernalia related to methamphetamine dealing, and books and records related to methamphetamine dealing was significant when compared to its whole, and its grant of authority to look for books and records not related to drug dealing was insignificant when compared to its whole. As far as we can tell from the record, the police found each item that they seized while they were looking for methamphetamine, paraphernalia related to methamphetamine dealing, and books and records related to methamphetamine dealing. The police actually seized marijuana, ecstasy, scales, and cash that included the bills with which the informant had paid Maddox less than 24 hours earlier. Although the police also seized "miscellaneous papers" from a bedroom, such papers were not offered or argued at the suppression hearing, were not used by anyone at trial, and are not of record on appeal; at a minimum, then, they seem to have been insignificant under the circumstances. Holding that the severability doctrine applies, we conclude that the warrant's overbreadth did not require suppression of the items admitted at trial.

3) 10-day delay before service of warrant

Maddox claims that even if the warrant was lawful at the time of its issuance on September 18, it was not lawful at the time of its execution on September 28. He reasons that even if the magistrate properly found probable cause on September 18, such cause "dissipated" when, on September 27, Maddox told the informant, and the informant relayed to the police, that Maddox was "out of [m]ethamphetamine" for "a couple days." Under these circumstances, Maddox now argues, the police were obligated to recontact the magistrate before executing the warrant; "report that [Maddox] did not have methamphetamine in residence on September 27"; and have the magistrate redetermine whether probable cause continued to exist. The State responds that the police were entitled to decide whether probable cause continued to exist after Maddox said he was "out of [m]ethamphetamine"; that the police did not believe his statement; and thus that probable cause continued to exist at the time of the search on September 28.

The parties agree that Washington does not have a "dissipation" case on point. They cite us, however, to several cases from other jurisdictions. *[Court's Footnote: Several Washington courts have implied, usually in dicta, that probable cause can "dissipate" after issuance but before execution. . .]* **[LED EDITORIAL NOTE: The Maddox Court then engages in extensive discussion of the case law from other jurisdictions.]**

Read together, these authorities show that the probable cause upon which a warrant is based at issuance can be affected (e.g., "dissipated") by information acquired after issuance but before execution. Here then, two questions remain: (1) When is probable cause affected to such an extent that it must be redetermined? (2) If probable cause must be redetermined, who must do that--a neutral magistrate or the police?

> We derive our answer to the first question from [two of the other-jurisdiction cases discussed in that part of the opinion not set forth in this **LED** entry]. According to **[one court's decision in a case involving conflicting responses from two drug-sniffing dogs – LED Ed.]**, it was necessary to redetermine probable cause because the post-issuance information supplied by the second dog would, if believed, have negated probable cause. According to [the other case] it was not necessary to redetermine probable cause because the post-issuance information obtained from "the fruitless consent search" would not, even if believed, have negated probable cause. Comparing the two cases, we conclude that probable cause must be redetermined only when information acquired after issuance but before execution would, if believed, negate probable cause.
>
> [W]e hold that if probable cause must be redetermined, and there are no exigent circumstances, the redetermination must be made by a neutral and detached magistrate.
>
> Applying these propositions here, we reject the State's argument that the police were entitled to decide whether Maddox was being truthful when he said he was out of methamphetamine. If Maddox's statement necessitated a redetermination of probable cause, and there were no exigent circumstances, it was up to the magistrate, not the police, to decide whether Maddox should be believed.
>
> We also reject, however, Maddox's argument that probable cause had to be redetermined. If believed, Maddox's statement showed only that his house did not then contain a saleable quantity of methamphetamine; it did not show that his house did not contain other evidence of methamphetamine dealing (e.g., non-saleable residue, scales, baggies, customer lists and accounts, the identifiable cash paid by the informant on September 18). Concluding that Maddox's statement would not have negated probable cause even if the police had returned to the magistrate, we hold that they were not required to do that, and that the trial court did not err by denying Maddox's motion to suppress.

[Some citations omitted]

LED EDITORIAL COMMENTS ON OVERBREADTH RULING: This comment addresses the analysis of the "overbreadth" issue above at pp. __ and those parts of the warrant authorization bolded above at pp. __.

We have not reviewed the briefing in the Maddox case to see what arguments and case citations were presented by the State in support of the portions of the warrant authorization that the Maddox Court declared to be invalid in its "overbreadth" analysis under the Fourth Amendment. Also, we cannot be certain from our review of the Maddox Court's analysis exactly which portions of the warrant authorization the Court found to be overbroad.

We would point out generally, however, that the courts in other jurisdictions have long held on the same Fourth Amendment issue that law enforcement is generally entitled to include in the warrant the authority to seek: "personal property tending to establish the identity of persons in control of the premises, including, but not limited to, utility company receipts, rent receipts, cancelled mail envelopes, photographs and keys." See, for example, People v. Nicolaus, 54 Cal. 3d 1001, 1007-1010 (Ct. App. 1986). See also the Ninth Circuit United States Court of Appeals rulings in U.S. v. McLaughlin, 851 F.2d 283, 285-86 (9th Cir. 1988) and U.S. v. Whitten, 706 F.2d 100, 1008-1009 (9th Cir. 1983).

"RECKLESS" IN VEHICULAR ASSAULT STATUTE MEANS DRIVING "IN A RASH OR HEEDLESS MANNER, INDIFFERENT TO THE CONSEQUENCES"; ALSO, DOUBLE JEOPARDY PROTECTIONS DO NOT PRECLUDE MULTIPLE CONVICTIONS BASED ON MULTIPLE VICTIMS IN A SINGULAR VEHICULAR ASSAULT INCIDENT

State v. Clark, 117 Wn. App. 281 (Div. II, 2003)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> In June 2001, Clark drove his car along a Vancouver, Washington street. Although the posted speed limit was 40 miles per hour, estimates of Clark's speed varied between 50 and 90 miles per hour. After rounding a curve, Clark struck a vehicle driven by Deborah Pratt. Pratt and two of Clark's passengers, Heather Schramm and Ashley Schahfer, sustained serious injuries.
>
> The State charged Clark with three counts of vehicular assault under RCW 46.61.522(1)(a). The jury found Clark guilty as charged. At sentencing, the trial court considered Clark's three convictions as separate criminal conduct.

ISSUES AND RULINGS: 1) Did the trial court properly instruct the jury on the meaning of "reckless" under the vehicular assault statute? (ANSWER: Yes); 2) Did the trial court violate double jeopardy principles in assessing punishment based on the number of victims of vehicular assault? (ANSWER: No)

Result: Affirmance of Clark County Superior Court convictions and sentence of Jason Ray Clark.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Definition of "reckless"

> The State charged Clark under the reckless manner alternative of the vehicular assault statute, which provides in relevant part: "A person is guilty of vehicular assault if he or she operates or drives any vehicle . . . [i]n a reckless manner and causes substantial bodily harm to another." RCW 46.61.522(1)(a) (emphasis added). The vehicular assault statute does not define "reckless." The trial court instructed the jury that to "operate a vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences."
>
> Clark argues . . . that the trial court should have defined "reckless" in the vehicular assault statute, RCW 46.61.522(1)(a), as synonymous with the definition in the reckless driving statute, RCW 46.61.500(1): willful or wanton disregard for the safety of persons or property." Accordingly, he concludes that because the State did not have to prove that mental state beyond a reasonable doubt, his conviction should be reversed.
>
> Nevertheless, Division One of this court recently rejected such an argument in State v. Roggenkamp, 115 Wn. App. 927 (Div. I, 2003):
>
> > The language of the vehicular homicide and vehicular assault statutes, the history of legislative enactments leading to the present vehicular homicide statute, and the judicial construction of these statutes establish that willful or wanton disregard for the safety of persons or property, an element of reckless driving, is not an element of vehicular homicide or vehicular assault.
> >
> > . . .
> >
> > We believe that use of a definition from a different statute to define "reckless" under

> the vehicular assault statute is incorrect, particularly in light of the established and contrary judicial construction of "reckless." . . . "[R]eckless" under the vehicular assault and vehicular homicide statutes means driving in a rash or heedless manner, indifferent to the consequences.

We find Roggenkamp persuasive and adopt it. Consequently, Clark's argument fails.

2) Double jeopardy/unit of prosecution

> Clark next contends that his three vehicular assault convictions violate double jeopardy because they arose from a single accident. Double jeopardy protects a defendant from multiple convictions under the same statute if he or she commits only one unit of the crime. Thus, when a defendant is convicted of multiple violations of the same statute, we review the statute to determine what "unit of prosecution" the Legislature intended to be a punishable act. We examine the relevant statute to ascertain what the Legislature intended. Clark argues that the Legislature intended that the unit of prosecution for vehicular assault be the accident that causes serious injury, irrespective of the number of people injured.
>
> That argument lacks merit. The vehicular assault statute, RCW 46.61.522(1)(a), punishes "substantial bodily harm to *another*." (Emphasis added.) That language indicates that the Legislature intended to measure punishment by the number of individuals who were victims, not each accident. Also, under RCW 9.94A.589(1)(a), it is not the "same criminal conduct" to punish a defendant for multiple vehicular assaults where there are multiple victims, even if multiple victims occupy the same vehicle. [*Court's footnote in part: State v. Bourne, 90 Wn. App. 963 (Div. II, 1998)* ***April 98 LED:18****]* The unit of prosecution is clear; there was no double jeopardy violation.

[Some citations omitted]

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) EXTENDED QUESTIONING OF SUSPECT IN DRIVEWAY ON DECEMBER EVENING HELD REASONABLE UNDER TERRY V. OHIO; ALSO, STATE LOSES SOME, WINS SOME, ON ISSUES OF "HARMLESS ERROR," "FRUIT OF THE POISONOUS TREE"/"ATTENUATION", "INEVITABLE DISCOVERY," AND GUN-CRIME SENTENCING – In State v. McReynolds, 117 Wn. App. 309 (Div. III, 2003), the Court of Appeals addresses several arrest, search and seizure issues, as well as sentencing issues, in a case involving prosecution of Randy D. McReynolds and his wife, Amy Jo McReynolds, for unlawful possession of stolen property and other charges.

This is the second time that the McReynolds case has been in the Court of Appeals. In the first Court of Appeals' decision (104 Wn. App. 560 (Div. III, 2001) **May 01 LED:11**), the Court of Appeals ruled, among other things, that one of five search warrants was invalid for failing to establish a probable cause nexus to the residence to be searched under State v. Thein, 138 Wn.2d 133 (1999) **Aug. 99 LED:15**. The Court of Appeals then remanded the case to the superior court for a hearing on whether the other four search warrants in the case were tainted in light of the appellate court's ruling on the first warrant. The State conceded on remand that three of the remaining four search warrants were also invalid, but the State argued that the fifth and final remaining warrant was valid. The superior court agreed, and so does the Court of Appeals in this latest review. However, on the rationale that illegally seized evidence was presented to the jury in the original prosecution of the McReynoldses, the Court of Appeals reverses the original convictions and remands the cases for possible re-trial.

A) Taint of invalid first warrant on subsequently obtained fifth warrant

The Court's holding on the "fruit of the poisoned tree" issue is that evidence contained in the search warrant affidavit for the fifth warrant was sufficiently untainted by the earlier unlawful searches to be admissible on an "attenuation" rationale, where: 1) the police officers' unlawful conduct under the prior warrants was not flagrant; 2) the officers had recognized the need for warrants, and the officers thus had followed the constitutional process for obtaining approval; 3) several independent, intervening events occurred between the time of the original, unlawful searches and the officers' application for the fifth warrant, i.e. -- a) the officers received a new tip that defendant-husband had rented a storage unit; b) the owner of the storage unit newly reported that the defendant-husband and his defendant-wife were cleaning out the storage unit; c) officers learned that the two defendants had rented a truck; d) a relative of the two defendants who lived at the same location as the defendants told officers that defendant-husband had sold items to second-hand dealer; e) the defendants' neighbor told officers that defendant-husband had stored stolen items on the property and had admitted to the neighbor to participating in burglaries; and f) the defendant-wife told the officers that "not all" items in her truck were stolen (thus impliedly admitting that some items were stolen), and she then consented to a search of the vehicle, where stolen items were found.

B) Inevitable discovery exception to the Exclusionary Rule

Along the way in the Court's analysis of the search warrant "taint" issue, the Court explains that the discovery of defendants' address was not subject to exclusion based on problems with the first warrant, even if the results of the unlawful police action under the first warrant led to the discovery of defendants' address. Such discovery was inevitable because other suspects who had been arrested at the scene of the earlier burglary lived on same property as the defendants, and also because, when defendant-husband was originally stopped near a burglary scene (a lawful stop that occurred prior to any search warrant activity), he gave an address that was on the road where the defendants' residence was located.

C) Not harmless error

The McReynolds Court rules that it was not harmless error for the trial court to admit into evidence in the first trial the evidence obtained pursuant to the unlawful searches. A new trial must be held because, in the first trial: 1) witnesses testified at length about the unlawful searches and what items were found; 2) one trial exhibit was obtained as a result of the illegal search; and 3) the State failed to demonstrate beyond a reasonable doubt that any reasonable jury would have convicted the defendants absent the error.

D) Terry seizure/arrest issue

Defendant Amy McReynolds contended that officers were not justified by reasonable suspicion when they seized her in a Terry detention. She also contended that, even if the seizure was initially justified, the duration of the seizure transformed it into an arrest, and that "arrest" was not supported by probable cause. The McReynolds Court rejects her arguments under the following analysis:

> At the time of the detention, the officers knew that Randy and Amy Jo McReynolds lived at the same property where Eugene McReynolds and Leonard Wolf were staying. Eugene McReynolds and Leonard Wolf had been arrested two days earlier at the site of a burglary; Randy McReynolds was stopped within shouting distance nearby. Randy and Amy Jo McReynolds were renting a storage unit, the contents of which they had put into the U-Haul truck the day after the arrests. Also, Harold Sears told officers that two weeks earlier Randy

McReynolds had sold a trailer full of items to a second-hand dealer. These facts created a reasonable suspicion that Randy McReynolds had possession of stolen property. The fact that Amy Jo McReynolds helped her husband empty the storage unit created a reasonable suspicion that she also participated in the crime. The officers had a lawful basis for detaining Amy Jo McReynolds.

The McReynoldses also contend the seizure exceeded the scope of a lawful Terry stop. To the extent they again [**i.e., as in their prior appeal – LED Ed. Note**] allege the officers were unduly aggressive, threatening, and abusive during the interview, "the [superior] court's findings directly or implicitly rejected this evidence and accepted the officers' accounts of the incident." McReynolds, 104 Wn. App. at 575-76 [**May 01 LED:11]**. And to the extent they allege the detention evolved into a full-scale custodial arrest, the answer is that during the interview Amy Jo McReynolds (1) admitted that "not all of the items in the truck were stolen,"… implying some of the items were stolen; (2) admitted she had the only key to the U-Haul truck, demonstrating her dominion and control over the truck and its contents; and (3) consented to a search of the vehicle she was driving, where officers found items she admitted she did not own. These additional facts provided probable cause that Amy Jo McReynolds possessed stolen property and justified the custodial arrest. The detention and arrest were lawful.

E) Sentencing issues

Amy and Randy McReynolds win on one significant sentencing issue when the Court of Appeals rules that, where defendants were charged with continuous possession of various items of stolen personal property during a period of 15 days, this was just a single act constituting one offense (even though the property belonged to multiple victims), and thus multiple convictions for first and second degree possession of stolen property violated constitutional double jeopardy protections.

On the other hand, Randy McReynolds suffers a significant loss when the Court rules, under the special sentencing provisions relating to firearms crimes, that consecutive sentences must be imposed for multiple convictions of unlawful possession of firearms under RCW 9.41.040 and for multiple convictions of possession of stolen firearms under RCW 9A.56.310.

Result: Reversal of Stevens County Superior Court multiple convictions of Randy D. McReynolds (PSP, possession of stolen firearms, and unlawful possession of firearms by a previously convicted person) and of Amy Jo McReynolds (PSP); remanded for possible re-trial with guidance provided by the Court of Appeals on possible sentencing options.

(2) BUSINESS OWNER MAY NOT PURSUE LAWSUIT AGAINST CITY OF SEATTLE AND OTHERS IN CASE THAT AROSE FROM UTILITIES-CUTOFF AFTER PROTESTORS TOOK OVER A PRIVATE BUILDING DURING THE FALL 1999 WTO CONFERENCE -- In Citoli v. City of Seattle, 115 Wn. App. 459 (Div. I, 2003), the Court of Appeals affirms a superior court dismissal of a lawsuit by a business owner against the City of Seattle and other parties in a case arising out of the fall 1999 World Trade Organization (WTO) conference in Seattle.

John Citoli is a business owner who suffered economic losses when the Seattle Police Department ordered that utilities be shut off after protestors occupied the upper two floors of three-story building in which Citoli rented space on the first floor. Citoli brought a lawsuit against the city, its former police chief, the former mayor, an electric utility, and a gas company. Citoli asserted multiple tort claims against the multiple defendants, as well as a § 1983 claim for alleged violation of his civil rights. The trial court granted summary judgment in favor of all defendants on all theories.

The Court of Appeals affirms the dismissal, holding that: (1) the need to respond to the protestors' actions of taking over the building constituted an "emergency" under a City of Seattle ordinance permitting interruption of electrical services during emergencies; (2) the electric utility did not breach its duty when it complied with police order to terminate electrical service to building; (3) the gas company's technical violation of a tariff in failing to notify the business owner that gas had been shut off did not subject it to liability for damages; (4) the City of Seattle and other defendants did not intentionally interfere with the owner's business relationships based on any improper purpose or any improper means; (5) the business owner did not suffer an unconstitutional taking of his property; (6) the utilities did not act under color of state law for § 1983 purposes; and (7) the defendants did not engage in "outrageous" conduct as required for the tort of outrage.

In its extensive discussion in support of its holding that the business owner did not suffer an unconstitutional taking of his property under color of law, the Citoli Court says the following, among many other things:

> Where the necessities of war or civil disturbance require the destruction or injury of private property, the resulting losses must be borne by the owners of the property, in that the safety of the state in such cases overrides all considerations of private loss. …
>
> Cougar Business Owners Association v. State, 97 Wn.2d 466 (1982) [a case arising out of the Mt. St. Helens disaster] involved the reasonableness of an executive order issued pursuant to the Governor's statutory authority to invoke police powers to protect the life, health, or property of the general public. Similar principles apply here. Police acted reasonably to protect the life, health, and property of the public in shutting down utilities and declining to forcibly remove the trespassers at the risk of an inferno and injuries to police and protestors alike. . . .
>
> [P]olice supervisory officials repeatedly testified that it is standard procedure to shut off utilities in a building takeover situation, and it is clear from their positions of authority and the nature of their testimony that they approved the policy. Thus, Citoli has established a specific policy or custom, and he has demonstrated that the policy was sanctioned by the officials responsible for making policy in that area of the city's business. He has also established a causal connection between the custom or policy and the deprivation of an alleged constitutional right, that is, he has presented evidence from which a rational trier of fact could conclude that he ultimately lost his business because it could not survive his inability to fully service his customers during the weeklong occupation of the building by protestors. His claim nevertheless fails, because he cannot demonstrate a constitutional deprivation, that is, he cannot establish a taking where police reasonably responded to the protestors' takeover of the building where he operated his business by ordering that utility services to the building be shut down. Neither can he demonstrate a constitutional right to a continuous flow of utilities so as to continue to operate his business during a civil disturbance where protestors have taken over the building where the business is located. And finally, he cannot establish a constitutional right to forcible removal by police of 75 to 250 protestors from the building where forcible removal posed a danger to life and property and police resources were already stretched to the limit and beyond, due to the overall nature of the WTO protests going on all over the downtown area.

Result: Affirmance of King County Superior Court summary judgment order dismissing all of Citoli's actions against the City of Seattle and all other defendants.

(3) INSANITY INSTRUCTIONS IN "DEIFIC DECREE" CASE HELD SUFFICIENT EVEN THOUGH THE INSTRUCTIONS DID NOT DEFINE "RIGHT" AND "WRONG" – In State v. Applin, 116 Wn. App. 818 (Div. I, 2003), the Court of Appeals rejects a defendant's argument that, in relation to his "deific decree" insanity defense, the jury should have been instructed on the definitions of "right" and "wrong." Defendant argued unsuccessfully that the jury should have been instructed on the relevant distinction in this context between the understanding of legal wrongfulness and the understanding of moral wrongfulness.

Blaine Applin killed a man with whom he had a disagreement. He shot the victim numerous times after the victim answered Applin's knock at the door. Applin pleaded insanity, contending that he was acting under a delusional belief that he had received a direct command from God to do the killing. The jury rejected Applin's insanity defense and convicted him of first degree murder.

At trial, the jury was given the following two instructions on insanity:

General insanity instruction: (in pertinent part)

> For a defendant to be found not guilty by reason of insanity you must find that, as a result of mental disease or defect, the defendant's mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or *was unable to tell right from wrong* with reference to the particular acts with which the defendant is charged.

Deific-decree instruction:

> A defendant is also not guilty by reason of insanity if you find that each of these elements has been proved by a preponderance of the evidence:
>
> 1) At the time of the acts charged the defendant had a mental disease or defect; and
>
> 2) As a result of that mental disease or defect, the defendant had a delusion that the had received a direct command from God to do the acts; and
>
> 3) The defendant did the acts because of that direct command and
>
> 4) *The direct command destroyed the defendant's free will and his ability to distinguish right from wrong.*

Applin argued on appeal that the jury should also have been instructed that a defendant is deemed to not understand right from wrong if the defendant fails to understand either legal wrongfulness or moral wrongfulness of his actions. The Applin Court acknowledges that it would have been improper, in light of Applin's deific-decree defense, to instruct the jury that inability to understand only moral wrongfulness does not meet the defense. That is, if a person believes that he is acting on a decree from God, and he is therefore unable to understand moral wrongfulness, then it does not matter that he knows his conduct is legally wrong.

The Applin Court holds, however, the instructions here were adequate because the jury was not given any mis-instruction. The law does not expressly require that a trial judge advise a jury in a deific-decree-insanity-defense case that lack of moral understanding alone suffices to meet defendant's burden. It is not necessary to instruct the jury on insanity beyond what was instructed in this case, the Applin Court concludes.

Result: Affirmance of Snohomish County Superior Court conviction of Blaine Alan Applin for first degree murder.

(4) EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION FOR HOMICIDE BY ABUSE – In State v. Madarash, 115 Wn. App. 500 (Div. II, 2003) the Court of Appeals holds that the evidence in the case supports defendant's conviction for homicide by abuse.

RCW 9A.32.055(1) provides in pertinent part that a person is guilty of homicide by abuse if, "under *circumstances manifesting an extreme indifference to human life*, the person causes the death of a child . . ., and the person has previously engaged in a *pattern or practice of abuse of assault or torture* of said child." (Emphasis added.) The Court of Appeals describes as follows the defendant's admission to police regarding the death-causing assault by Tammy Kay Madarash of her then-4½ -year-old stepchild. The assault was the culmination of four years of repeated physical and emotional torture and abuse of the child:

> After three interviews with Madarash, Kelso police arrested her on September 17. Madarash told the officers several versions of what had happened to Jennifer. Her final account was that late in the afternoon on September 15, Jennifer had taken a sip of Madarash's Diet Pepsi without permission. As punishment, Madarash forced Jennifer to drink a 48-ounce Diet Pepsi within a matter of minutes. After drinking the Diet Pepsi, Madarash told police Jennifer "burped up something . . . or vomited on herself."
>
> Madarash then pushed Jennifer, fully clothed, into a cold bath. She began throwing cups of cold water in Jennifer's face, throwing them forcefully and continually, into her mouth and onto her face. Jennifer began coughing, crying, and pleading with Madarash to stop. Madarash told police that she said she "didn't care if Jennifer didn't like it" because she "wasn't going to stop." Jennifer put her hands in front of her face to block the water, and Madarash ordered Jennifer to put her hands down. Madarash continued to throw cups of water in Jennifer's face and open mouth for five to ten minutes.
>
> Madarash also told police that because Jennifer began trying to climb out of the bathtub, she "grabbed Jennifer by the arm and pulled her down under the water . . . face down in the tub." Madarash could not remember how long Jennifer was underwater. Jennifer again tried to climb out of the bathtub and slipped back underneath the water for two or three more seconds. Each time Jennifer tried to get out of the bathtub, Madarash threw cups of water in her face and mouth.
>
> Madarash told detectives that when she finally allowed Jennifer to get out of the bathtub, she could tell that something was wrong because Jennifer was wheezing and had a rattling in her chest. Later that evening, Jennifer collapsed.

Scientific evidence in the case established that the child died due to reduced sodium levels caused by drowning or "water" intoxication.

On appeal, one of Madarash's arguments was that the first degree murder statute's definition of "extreme indifference" applies under the "homicide by abuse" statute, and therefore the State was required to prove that she understood what specific consequence – i.e., fatal reduction of the body's sodium levels – would result from her assault of the child. After explaining its legal rationale for rejecting this argument, the Court of Appeals states as follows its holding on this "extreme indifference" sub-issue:

> We decline to adopt Madarash's argument that the first degree murder definition of "extreme indifference" applies here. Therefore, we hold that Madarash did not have to know or understand the physiological response, or any other results, that Jennifer might endure from drinking a 48-ounce Diet Pepsi and ingesting great quantities of water in the bathtub. Rather, in order to have acted with extreme indifference to Jennifer's life, Madarash simply had to not care whether Jennifer lived or died. The evidence in the record supports this conclusion.

The Madarash Court also gives a detailed account of the evidence showing a pattern of defendant's continual assault and cruel torture of the child over a four-year period. The Court declares the evidence to "overwhelmingly" support this part of the trial court's findings.

Result: Affirmance of Cowlitz County Superior Court conviction of Tammy Kay Madarash for homicide by abuse.

NOTE: the Court of Appeals reverses a separate conviction for second degree felony murder on grounds not addressed in this **LED** entry. See In re Personal Restraint of Andress, 147 Wn.2d 602 (2002) (reconsideration denied) **Dec 02 LED:16**.

(5) "SAME CRIMINAL CONDUCT" GETS NARROW, PRO-PROSECUTION INTERPRETATION IN CHILD PORNOGRAPHY SENTENCING – In State v. Ehli, 115 Wn. App. 556 (Div. III, 2003), the Court of Appeals rejects a defendant's argument that possessing child pornography is a victimless crime, and therefore his possession of several computer images of child pornography was only a single crime for purposes of sentencing. The Ehli Court briefly summarizes its ruling as follows:

> A sentencing court has the discretion to find two or more current offenses to be the "same criminal conduct" provided there is identity of time, place, and victims. Former RCW 9.94A.400(1)(a) (2000) (now RCW 9.94A.589(1)(a)). Here, David Ehli downloaded and transmitted multiple images of different young children having sex with adults. The question is whether the children's lack of knowledge of the downloading or the State's failure to identify the particular victims renders the crime "victimless" for purposes of a "same criminal conduct" determination. It does not. And so we affirm the conviction and sentence.

Result: Affirmance of 48-month sentenced given to David Carson Ehli based on his convictions for dealing in depictions of a minor engaged in sexually explicit conduct and four counts of possession of depictions of a minor engaged in sexually explicit conduct.

(6) "RAPE SHIELD" LAW AT RCW 9A.44.020 DOES NOT EXCUSE DEFENSE ATTORNEY'S FAILURE TO EFFECTIVELY DEFEND CLIENT – ATTORNEY SHOULD HAVE IMPEACHED AN ALLEGED CHILD RAPE VICTIM'S TESTIMONY WITH EVIDENCE REGARDING HER HISTORY OF OTHER SEXUAL PARTNERS – In State v. Horton, 116 Wn. App. 909 (Div. II, 2003), the Court of Appeals rules that the defense counsel's failure to comply with the rules of evidence when presenting the alleged victim's prior inconsistent statements was unconstitutionally deficient performance at a trial for rape of a child and child molestation. Defense counsel wanted to impeach the victim's trial testimony that she had not had sexual intercourse with anyone other than defendant. Defense counsel tried to do so by calling witnesses who would say that the victim had made out-of-court statements acknowledging sexual activity with others. However, defense counsel was unconstitutionally defective because defense counsel failed to give the victim a chance to explain the statements by calling the statements to the victim's attention or by arranging for the victim to remain in attendance after testifying.

Along the way, the Horton Court explains that the rape shield statute, RCW 9A.44.020(4), did not preclude introduction of the alleged victim's prior statement that she had had sexual intercourse with someone other than defendant. Her prior statement was inconsistent with her trial testimony that she had engaged in intercourse only with the defendant. Such evidence was offered to rebut the implication that defendant had caused "penetrating trauma" to the victim's hymen, and that the victim was testifying inaccurately. The evidence was not introduced to show, in violation of the "rape shield" law, only that the victim had a propensity for sexual conduct or that the victim had engaged in sexual conduct at some earlier time.

The Horton Court also holds that the defense attorney was unconstitutionally defective in her performance when she failed to object to the prosecutor's improper statement in closing argument: "[T]he state believes, this prosecutor believes, that [the defendant] got up [on the witness stand] and lied."

The Horton Court also rejects the State's argument that these errors were harmless under the totality of the circumstances.

Result: Reversal of Pierce County Superior Court conviction of Thomas Ray Horton for rape of a child (1st degree) and child molestation (1st degree); case remanded for re-trial.

(7) OFFICER'S TESTIMONY THAT HE DID NOT BELIEVE DEFENDANT'S STORY WAS IMPROPERLY ADMITTED INTO EVIDENCE – In State v. Jones, 117 Wn. App. 89 (Div. II, 2003), the Court of Appeals rules that reversible error was committed in a prosecution for unlawful possession of a firearm when the prosecutor elicited from a law enforcement officer that, during interrogation, the officer told the defendant that the officer did not believe him.

Such testimony violated the rule stated in State v. Demery, 144 Wn.2d 753 (2001) **Dec 01 LED:15** (a case involving admission into evidence of a tape-recording of an interrogation) where the Washington Supreme Court applied the basic principle that one witness may not testify that another witness is not credible. That principle is violated, the Demery Court held, and the Jones Court confirms, when the prosecutor introduces evidence that, in interrogating the defendant, the officer told the defendant that the officer did not believe the defendant. This does not mean, of course, that officers should avoid this useful and perfectly permissible tactic in interrogation. It just means that the prosecutor and officer generally must avoid addressing this particular interrogation tactic at trial.

Result: Reversal of Clark County Superior Court conviction of David Doyle Jones for unlawful possession of a firearm.

(8) PRIOR GUILTY PLEA MEANS PLEADING PARTY CANNOT LATER SUE FOR MALICIOUS PROSECUTION ON THE MATTER THAT WAS THE SUBJECT OF THE PLEA – In Clark v. Baines, 114 Wn. App. 19 (Div. II, 2002), Wayne Baines, a male caregiver, was sued for sexual assault by Piety Ann Clark, a legally blind woman for whom he had been the caregiver. The Court of Appeals rules 2-1 that, because the caregiver had previously pleaded guilty to fourth degree assault with sexual motivation on the matters at issue, the caregiver could not lawfully pursue a counterclaim for malicious prosecution.

The procedural background in the case is as follows: Wayne A. Baines entered an Alford guilty plea to two counts of fourth degree assault with sexual motivation for incidents involving Ms. Clark, a blind woman for whom Baines had been the state-provided caregiver. Ms Clark then sued Baines for sexual battery and outrage. Baines filed a counterclaim for malicious prosecution. The trial court granted Ms. Clark's motion for summary judgment.

By a 2-1 vote, the Court of Appeals agrees. One element critical to a malicious prosecution action is the accuser's lack of probable cause. Put another way, probable cause is a complete defense to a civil action for malicious prosecution. The Court of Appeals' majority in the Clark case holds that a conviction on an accusation, even if under an Alford plea of guilty, is conclusive evidence of PC in this context, unless that conviction was obtained by fraud or perjury or other corrupt means. This is so even if the conviction is reversed on appeal (something that did not happen here), unless the reversal is based on absence of probable cause. Accordingly, because Baines pleaded guilty to the assaults on Ms. Clark, she must be conclusively presumed to have had probable cause for her charges, and Baines's counterclaim against Ms. Clark must be dismissed.

Result: Affirmance of Pierce County Superior Court's order that granted summary judgment to Piety Ann Clark and dismissed Wayne Baines' counterclaim against Ms. Clark for malicious prosecution.

Status: The Washington Supreme Court has accepted this case for review.

LED EDITORIAL COMMENT: The rule of law applied in Clark (where the facts involved a malicious prosecution civil lawsuit by one citizen against another citizen) also bars lawsuits by prior guilty-pleaders against law enforcement officers for alleged malicious prosecution in relation to the matter on which the guilty plea was entered.

****

NEXT MONTH

The November 2003 **LED** will include an entry on the unanimous September 11, 2003 Washington Supreme Court decision in State v. Jackson. The Jackson Court rules under article 1, section 7 of the Washington Constitution that a search warrant is required for police to attach a Global Positioning System (GPS) device to a suspect's motor vehicle. The Jackson Court also holds that the search warrants used in the case satisfied constitutional requirements.

****

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. another website for U.S. Supreme Court opinions is the Court's website at [http://www.supremecourtus.gov/opinions/02slipopinion.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since 199 can be accessed (by date of decision only) at

Easy access to relatively current Washington state agency administrative rules (including DOL rules

in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2003, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's home page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office home page is [http://www/wa/ago].

****

The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to [ledemail@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.cjtc.state.wa.us].